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3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA
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9 RICHARD ROE, RICHARD ROE, II and
10 DON A. NELSON,

11 Plaintiffs,

12 v.

13 JOHN DOE, MARK CUBAN, DALLAS
14 BASKETBALL, LTD and DOES 1 through
15 10,

16 Defendants.
17 _____/

No. C 09-0682 PJH

**ORDER GRANTING DEFENDANTS'
SPECIAL MOTION TO STRIKE; AND
GRANTING PLAINTIFF'S MOTION TO
STRIKE**

18 Before the court is defendants Mark Cuban ("Cuban") and Dallas Basketball, Ltd.'s
19 (collectively "defendants") special motion to strike, which plaintiff Don Nelson ("Nelson")
20 opposes. Also before the court is Nelson's motion to strike defendants' reply brief or, in the
21 alternative, all evidence presented for the first time in the reply brief. The court finds these
22 matters suitable for resolution without oral argument pursuant to Civil Local Rule 7-1(b).
23 Having carefully read the parties' papers submitted initially and pursuant to the court's
24 request for supplement briefing, and considered the relevant legal authority, defendants'
25 special motion to strike is GRANTED, and Nelson's motion to strike is GRANTED, for the
26 reasons stated below.

BACKGROUND

27 Nelson is a former employee of the Dallas Mavericks ("Mavericks"), a basketball
28 franchise in the National Basketball Association ("NBA"). First Amended Complaint ("FAC")
¶ 7. From December 1997 to August 2006, Nelson was employed by the Mavericks in

1 various capacities, including general manager, head coach and consultant. Id. In early
2 2000, Cuban became the controlling owner of the Mavericks and its organization entity
3 Dallas Basketball, Ltd. Id.

4 On or around July 1, 2003, Nelson and the Mavericks agreed to enter into a "Fifth
5 Amendment to the Employment Agreement" (the "contract"), which provided that Nelson
6 would perform head coaching and general manager services for the Mavericks through
7 June 30, 2006, and thereafter perform five years of consulting services at \$200,000 per
8 year. FAC ¶ 8; John O'Connor ("O'Connor") Decl., Exh. 6. The contract, which
9 incorporated the initial 1997 Employment Agreement as well as the four other previous
10 agreements, included a "non-competition" clause, which states that during the term of
11 employment Nelson "shall not perform, directly or indirectly, any duties or provide any
12 consultative or related services for any professional or amateur basketball organization or
13 related entity, nor directly or indirectly, control or otherwise be involved in any business
14 which is competitive with the [Mavericks]." O'Connor Decl., Exhs. 5-6.

15 In March 2005, Nelson and Cuban orally agreed that Nelson would step down as
16 head coach of the Mavericks, but would continue to be paid as if he were still coaching.
17 FAC ¶¶ 10-11. Nelson's contract, however, was not amended to reflect this agreement.
18 Id. Nor was it amended to remove the consulting portion. In June 2006, prior to the
19 commencement of Nelson's five-year consulting services, Cuban inquired into whether the
20 Mavericks were obligated to honor the consulting portion of Nelson's contract. Id. ¶ 11.
21 Cuban was subsequently informed by his staff that the Mavericks were under a legal
22 obligation to pay Nelson for consulting services starting July 1, 2006 and continuing
23 through June 30, 2011. Id. Cuban, nevertheless, ordered that Nelson's consulting salary
24 be withheld. Id.

25 On July 15, 2006, the Mavericks did not pay Nelson his consulting salary. FAC ¶ 11,
26 18. On or around July 26, 2006, Nelson complained to the Mavericks Chief Financial
27 Officer, Floyd Jahner ("Jahner"), about the Mavericks' failure to pay his consulting salary.
28 Id. ¶ 12. Jahner informed Nelson that it was Cuban's position that the March 2005 oral

1 agreement released the Mavericks from any obligation to pay Nelson for consulting
2 services. Id.; O'Connor Decl., Exh. 9. Nelson informed Jahner that Cuba's position was
3 incorrect. FAC ¶ 12. Jahner then told Nelson that while Cuban admitted that the
4 Mavericks were obligated to honor the contract, Cuban nonetheless did not want to pay
5 Nelson the full amount owed. Id. ¶ 13.

6 Following Jahner's inquiry into whether he would be willing to take less money than
7 required under the contract, Nelson stated that he would agree to a "walk away" settlement,
8 ending the consulting portion of the contract for an immediate payment of \$500,000, half
9 the money owed under the contract. FAC ¶¶ 13-14. According to Nelson, Jahner orally
10 agreed to this proposal. Id. ¶ 15. However, on July 31, 2009, Jahner sent Nelson a
11 document entitled, "Sixth Amendment to Employment Agreement," which incorporated the
12 previous five agreements, including the non-competition clause, and provided that the
13 Mavericks would pay Nelson \$500,000 in exchange for five years of consulting services.
14 Id. ¶ 15; O'Connor Decl., Exh. 13. Nelson rejected this offer, and no settlement was ever
15 reached. FAC ¶ 16.

16 On August 3, 2006, Nelson's attorney spoke with the president of the Golden State
17 Warriors ("Warriors"), an NBA franchise located in Oakland, California, about the head
18 coaching position on behalf of Nelson. O'Connor Decl., Exh. 4. On August 4, 2006,
19 Nelson, through his attorney, formally claimed that the Mavericks were in breach of his
20 contract for failing to pay his consulting salary on July 15 and 30, 2009. FAC ¶¶ 11, 18.
21 On August 15, 2006, the Mavericks, again, did not pay Nelson his consulting salary. Id.
22 On August 30, 2006, Nelson accepted the head coaching position with the Warriors,
23 signing a three-year contract starting with the 2006-2007 season. Id. ¶ 19. Upon learning
24 of Nelson's agreement with the Warriors, the Mavericks not only continued to withhold
25 Nelson's consulting salary, but also began to withhold deferred compensation owed to
26 Nelson for services performed between June 30, 1998 and June 30, 2006. Id. ¶¶ 20-21.

27 In April 2007, Nelson filed a claim against the Mavericks in arbitration seeking to
28 obtain compensation owed under the contract. FAC ¶ 22. According to Nelson, his

1 arbitration claim, and the Mavericks' subsequent counterclaim, "received great national and
 2 worldwide attention and publicity." Id. ¶ 23. On or around September 21, 2007, while the
 3 dispute over Nelson's contract was ongoing, Cuban appeared on the Murph & Mac radio
 4 show, broadcast by KNBR 680 throughout the San Francisco Bay Area, to promote his
 5 upcoming appearance on the television show "Dancing With The Stars." Id. ¶¶ 24-25.

6 The relevant portions of the radio interview read as follows:

7 **Murph:** We are waiting for Mark Cuban on his radio tour promoting Dancing
 8 with the Stars. I am going to ask him about . . . his lawsuit with [Nelson] for
 9 knowing inside information on the team.

10 . . .

11 **Murph:** We love [Nelson], everybody loves [Nelson] here. You hate [Nelson].
 12 Give us some Cuban/[Nelson] updates. Are you guys still battling it out in the
 13 courts right now?

14 **Cuban:** Yeah. And, you know what, I will give you guys the scoop here. . . . I'll
 15 tell you why, because imagine that you guys get a Christmas bonus every year,
 16 and you went in and said, 'Boss, I know I have a five-year deal, and I get a
 17 Christmas bonus of 200 K every year. I'll tell you what, if you pay me half of that
 18 just up front in cash, then you won't have to pay me anymore, and we're all set.
 19 You don't have to pay me my Christmas bonus the next five years.' And then I
 20 find out you are getting ready to take that money and quit your job. Would you
 21 be mad?

22 . . .

23 **Murph:** I got you. . . . It's a labor/management dispute . . .

24 **Cuban:** No, it's not even. He tried to rip me off.

25 . . .

26 **Mac:** Like you feel like you were being deceived?

27 **Cuban:** Oh, yeah. He came in and said, 'You know what, Mark, pay me . . .
 28 you owe a consulting fee of \$200 K a year for the next five years. Give me half
 of it up front, we'll call it even. And, you know, we will go on, and . . . everybody
 will still be friends, and . . . the consulting deal will stay in force with its
 non-compete clause and everything.' And then the next thing I know, he's taking
 a job with the Warriors. Now, we ended up not paying him that because I heard
 about the job before I wrote the check, but I was more than a little bit pissed . . .

Murph: Hey, did you . . . sue him for inside knowledge?

Cuban: Well, no, . . . I sued him for the non-compete.

Murph: Okay.

. . .

Cuban: . . . I wouldn't have sued him . . . if he would have just come in [and]
 said, you know what, I am going to take this other job, Mark. I want to keep on
 coaching. You know I would really appreciate it if you would let me go. I would

1 let him go. But, instead, he tried to get his advance bonus payments and take
2 off with them, and that really made me mad.

3 **Murph:** I got you. So what's the status right now?

4 **Cuban:** You know what, I don't even know the latest. We were supposed to
5 have a mediation . . . But, you know . . . business is business. If [Nelson] were
6 here, I'd have a beer with him. I like the guy personally. . . . And it's just I just
7 didn't like the way that was handled, and I thought he tried to rip me off.

8 Amanda Bush Decl., Exh. 1.¹

9 Nelson alleges that Cuban falsely described the details of the contract dispute in a
10 way intended to put him in disrepute, shame and obloquy, including depicting Nelson as
11 engaging in false, fraudulent and deceptive business practices, and as attempting to "rip
12 off" and "deceive" Cuban and the Mavericks, thereby defaming him in his trade, business
13 and profession." FAC ¶¶ 25-28. Specifically, Nelson alleges that Cuban defamed him by
14 agreeing with one of the radio host's that he was "deceived" by Nelson, and by twice stating
15 that Nelson tried to "rip [him] off." Id. ¶¶ 26, 29. Nelson asserts, on information and belief,
16 that Cuban's statements were "broadcast on other radio stations and were published
17 nationwide." Id. ¶ 25.

18 More particularly, Nelson alleges that Cuban described the details of the dispute
19 falsely, in a way intended to put him in disrepute, shame and obloquy, by stating that: the
20 dispute arose from Nelson's false representations and fraudulent practices; Nelson had
21 approached Cuban representing that he intended to work with the Mavericks for the full five
22 years remaining on his contract; Nelson had stated that he intended on working the
23 remaining five years with all contract provisions intact, including the non-compete clause;
24 Nelson acted deceptively, falsely and fraudulently in seeking an immediate advance
25 payment of \$500,000 in full satisfaction of the \$1,000,000 owed under the contract
26 (\$200,000 per year for five years); Nelson did not intend to work the full five years or

27 ¹ Nelson attached, as Exhibit A to the FAC, a transcript of the portion of the interview
28 containing the alleged defamatory statements made by Cuban. However, because the
transcript submitted by defendants provides more background context and is substantially
similar in all material respects to the transcript attached to the FAC, and because Nelson did
not object or otherwise question the veracity of the transcript submitted by defendants, the
court will cite to the transcript submitted by defendants.

1 adhere to the contract, including the non-competition clause; Nelson acted deceptively,
2 falsely and fraudulently in seeking to obtain money for work he did not intend on
3 performing, and that this request was at Nelson's initiative and not the result of any action
4 by Cuban; and Nelson, at the time of this request, intended to accept employment with the
5 Warriors. FAC ¶ 28.

6 Nelson further alleges that Cuban's statements were false in the following ways: the
7 discussion of the parties' contractual obligations was commenced by defendants, not
8 Nelson; the suggestion that Nelson take a reduced payment was initiated by defendants,
9 not Nelson; there were no discussions between Cuban and Nelson on the subject of the
10 contract dispute; the discussions regarding the contract dispute were a result of a breach of
11 contract and intended future breach of contract by defendants, not by a breach or intended
12 breach of contract by Nelson; Nelson did not seek payments on the representation that he
13 would work for five years, or work for any length of time, in exchange for a reduced
14 advance payment; Nelson sought a reduced payment as a settlement of an obligation that
15 the Mavericks were breaching rather than in exchange for five years of work; Nelson never
16 represented that he would fulfill the "non-compete" portion of his contract, rather he
17 represented that he would "walk-away" from the contract for a reduced payment; at the time
18 Nelson made the settlement offer, he did not have an employment offer from the Warriors;
19 Nelson did not negotiate and accept a job with the Warriors until Cuban was already in
20 breach of the contract; Nelson did not try to "rip off" or "deceive" Cuban; Cuban withheld
21 paying Nelson \$500,000 because he proposed a "walk-away" settlement, not because
22 Cuban discovered that he was taking the Warriors job; and Cuban attempted to force
23 Nelson to perform services for less than the contractually stated amount. FAC ¶ 29.

24 Finally, Nelson alleges, on information and belief, that on or around July 31, 2008,
25 defendants defamed him by causing several false and defamatory statements, embodied in
26 written e-mails from Cuban, to be published in public newspapers in the United States and
27 the world via the Internet. FAC ¶ 32. Nelson alleges that these e-mails, in essence,
28 "accused Nelson of lying to Cuban and the [Mavericks], attempting to deceive and defraud

1 Cuban and the [Mavericks], and obtain money for services he did not intend to perform.”
2 Id. According to Nelson, “[t]he gravamen of [Cuban’s] statements was to the effect that
3 Nelson had attempted to deceive, rip-off and defraud [Cuban] and the [Mavericks], and that
4 Nelson, in his contractual dealings . . . had been less than truthful.” Id. Nelson alleges that
5 the “specific publications of such defamatory statements of which [he] is presently aware
6 include, on information and belief, statements to the Associated Press, to the Fort Worth
7 Star-Telegram and to the Gannett newspapers.” Id. ¶ 33.

8 On September 17, 2008, Nelson commenced the instant action in the Superior Court
9 of California, County of Alameda against defendants alleging one cause of action for
10 defamation. On September 19, 2008, Nelson filed a first amended complaint. Defendants
11 removed the case on the basis of diversity jurisdiction on February 17, 2009. On February
12 23, 2009, defendants filed a special motion to strike. On April 1, 2009, Nelson filed an
13 opposition. A reply was filed on April 8, 2009.

14 On April 15, 2009, Nelson filed a motion to strike the reply brief. In his motion to
15 strike, Nelson requested leave of court to conduct discovery on the issue of actual malice.
16 On April 20, 2009, the court issued an order, stating that Nelson and defendants were
17 entitled to conduct limited discovery on the issue of actual malice. The parties were
18 directed to complete discovery by May 22, 2009, and to submit supplemental briefing on
19 the issue of actual malice. On June 3, 2009, Nelson filed a supplemental opposition to
20 defendants’ motion to strike, and on June 12, 2009, defendants filed a supplemental reply.

21 DISCUSSION

22 I. Nelson’s Motion to Strike Reply Brief

23 On April 15, 2009, Nelson moved the court for an order striking defendants’ reply
24 brief or, in the alternative, all evidence presented for the first time in the reply brief, arguing
25 that defendants improperly introduced new evidence. Specifically, Nelson objects to the
26 numerous “articles concerning the contractual dispute” cited by defendants in footnote two
27 of their reply brief.

“ ‘It is well accepted that raising of new issues and submission of new facts in [a] reply brief is improper.’ ” Schwartz v. Upper Deck Co., 183 F.R.D. 672, 682 (S.D. Cal. 1999) (citing Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996) (“We agree with the Seventh Circuit, which held that ‘[w]here new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond.’ ”)); see also Contratto v. Ethicon, Inc., 227 F.R.D. 304, 309 n. 5 (N.D. Cal. 2005). Because the facts in footnote two of defendants’ reply brief constitute new evidence raised for the first time in reply, the court will not consider this evidence in ruling on defendants’ special motion to strike. The court, however, will not strike defendants’ reply brief in its entirety. Nelson offers no justification for this request. To the extent that Nelson’s motion contains a section entitled, “Plaintiff’s Sur-Reply Opposition To Defendants’ Motion to Strike [sic],” this portion of the motion is STRICKEN. Surreplies are not authorized without first obtaining leave of court. See Civ. L.R. 7-3(d) (once a reply brief is filed, no additional memoranda may be filed without court approval).

II. Defendants’ Special Motion to Strike

Defendants seek to strike Nelson’s claim for defamation pursuant to California’s Anti-Strategic Lawsuit Against Public Participation (“anti-SLAPP”) statute, Cal.Code Civ. Proc. § 425.16.

A. Standard

“[D]efendants sued in federal courts can bring anti-SLAPP motions to strike state law claims and are entitled to attorneys’ fees and costs when they prevail.” Verizon Delaware, Inc. v. Covad Communications Co., 377 F.3d 1081, 1091 (9th Cir. 2004). An anti-SLAPP motion to strike “may be filed within 60 days of the service of the complaint or, in the court’s discretion, at any later time upon terms it deems proper.” Cal.Code Civ. Proc. § 425.16(f).

Under the anti-SLAPP statute, “a cause of action shall be subject to a special motion to strike if (1) the cause of action arises from an act in furtherance of the defendant’s constitutional right of petition or free speech in connection with a public issue, and (2) the

1 plaintiff is unable to establish a probability of prevailing on the merits of the claim.” Hall v.
 2 Time Warner, Inc., 153 Cal.App.4th 1337, 1345 (2007) (citing Cal.Code Civ. Proc. §
 3 425.16(b)(1)). The anti-SLAPP statute “establishes a procedure by which the trial court
 4 evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early
 5 stage of the litigation.” Schaffer v. City and County of San Francisco, 168 Cal.App.4th 992,
 6 998 (2008). The anti-SLAPP statute was enacted to stem “a disturbing increase in lawsuits
 7 brought primarily to chill the valid exercise of the constitutional rights of freedom of speech.”
 8 Cal.Code Civ. Proc. § 425.16(a). The purpose of the statute “is to curtail the chilling effect
 9 meritless lawsuits may have on the exercise of free speech and petition rights, and the
 10 statute is to be interpreted broadly to accomplish that goal.” Schaffer, 168 Cal.App.4th at
 11 998 (citing Cal.Code Civ. Proc. § 425.16(a)); see also Vess v. Ciba-Geigy Corp. USA, 317
 12 F.3d 1097, 1109 (9th Cir. 2003) (The purpose of the anti-SLAPP statute is “to allow early
 13 dismissal of meritless first amendment cases aimed at chilling expression through costly,
 14 time-consuming litigation.”).

15 A court considering a motion to strike under the anti-SLAPP statute must engage in
 16 a two-part inquiry. First, a defendant must make an initial prima facie showing that the
 17 plaintiff’s suit arises from an act in furtherance of the defendant’s rights of petition or free
 18 speech. Hall, 153 Cal.App.4th at 1345; Vess, 317 F.3d at 1110. To evaluate this showing,
 19 the court must consider “the pleadings, and supporting and opposing affidavits stating the
 20 facts upon which the liability or defense is based.” Cal.Code Civ. Proc. § 425.16(b)(2);
 21 Martinez v. Metabolife Int’l, Inc., 113 Cal.App.4th 181, 186 (2003).

22 Second, if the moving party makes the prima facie showing, the burden shifts to the
 23 plaintiff to demonstrate a probability of prevailing on the challenged claims. Hall, 153
 24 Cal.App.4th at 1345; Vess, 317 F.3d at 1110. To satisfy this burden, the plaintiff must
 25 show that “the complaint is legally sufficient and supported by a prima facie showing of
 26 facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”
 27 Metabolife Intern., Inc. v. Wornick, 264 F.3d 832, 840 (9th Cir. 2001); Wilson v. Parker,
 28 Covert & Chidester, 28 Cal.4th 811, 821 (2002). “This burden is much like that used in

determining a motion for nonsuit or directed verdict, which mandates dismissal when no reasonable jury could find for the plaintiff.” Metabolife, 264 F.3d at 840. In order to avoid being stricken as a SLAPP, a plaintiff need only establish that his or her claim has minimal merit. Hailstone v. Martinez, 169 Cal.App.4th 728, 735 (2008) (citing Soukup v. Law Offices of Herbert Hafif, 39 Cal.4th 260, 291 (2006)). Nevertheless, a plaintiff must adduce competent, admissible evidence, and cannot simply rely on his or her pleadings, even if verified. Hailstone, 169 Cal.App.4th at 735.

“In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant; though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim.” Wilson, 28 Cal.4th at 821 (citation omitted and emphasis in original). “[A] defendant’s anti-SLAPP motion should be granted when a plaintiff presents an insufficient legal basis for the claims or ‘when no evidence of sufficient substantiality exists to support a judgment for the plaintiff.’ ” Metabolife, 264 F.3d at 840.

B. Analysis

1. Constitutionally Protected Activity

A cause of action arises from protected activity within the meaning of § 425.16(b)(1) only if the defendant’s act underlying the cause of action, and on which the cause of action is based, was an act in furtherance of the defendant’s right of petition or free speech in connection with a public issue. Hall, 153 Cal.App.4th at 1346 (citing City of Cotati v. Cashman, 29 Cal.4th 69, 78 (2002)). Section 425.16(e) describes four categories of conduct that constitute protected activity under the statute. The two categories that are potentially applicable to the present action are “any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest” or “any other conduct in furtherance of the exercise of the constitutional right of

1 petition or the constitutional right of free speech in connection with a public issue or an
2 issue of public interest.” See Cal.Code Civ. Proc. § 425.16(e)(3), (4).

3 “A statement or other conduct is ‘in connection with an issue of public interest’ or ‘in
4 connection with a public issue or an issue of public interest’ if the statement or conduct
5 concerns a topic of widespread public interest and contributes in some manner to a public
6 discussion of the topic.” Hall, 153 Cal.App.4th at 1347 (citations omitted) (citing Wilbanks
7 v. Wolk, 121 Cal.App.4th 883, 898 (2004)). “An issue of public interest” has been defined
8 as “any issue in which the public is interested.” Nygard, Inc. v. Uusi-Kerttula, 159
9 Cal.App.4th 1027, 1042 (2008); see also Hailstone, 169 Cal.App.4th at 736 (2008) (noting
10 that while the precise boundaries of a public issue have not been defined, in each case
11 where it was determined that a public issue existed, the subject statements either
12 concerned a person or entity in the public eye, conduct that could directly affect a large
13 number of people beyond the direct participants or a topic of widespread, public interest).

14 Applying these standards, the court concludes that the allegedly defamatory
15 statements on which Nelson’s defamation claim is predicated constitute conduct in
16 furtherance of Cuban’s right of free speech in connection with an issue of public interest.
17 The challenged statements arose in the context of an on-air interview between radio co-
18 hosts and Cuban regarding a contract dispute between defendants and Nelson, a topic of
19 significant interest to the public and the media. As the head coach and/or general manager
20 for several NBA franchises, Nelson occupied a high-profile position and is clearly well-
21 known within the professional basketball community. Furthermore, as conceded by
22 Nelson, the contract dispute “received great national and worldwide attention and publicity,”
23 and thus was of concern to a substantial segment of the public, including players on the
24 Mavericks, players and coaches of other NBA franchises and fans of the NBA. This
25 publicity is evidenced by multiple articles referencing the contract dispute, including several
26 articles containing quotes from Nelson and Cuban commenting on the dispute. See e.g.,
27 Exhs. 2-10, attached to Defs.’ Special Mtn. to Strike (various media articles referencing the
28 contract dispute, including articles published by the Los Angeles Times and Associated

1 Press, among others). Accordingly, given the widespread public interest in this dispute, the
2 court finds that Cuban's statements were made in connection with an issue of public
3 interest. Cal.Code Civ. Proc. § 425.16(e)(4); see Carlisle v. Fawcett Publications, Inc., 201
4 Cal.App.2d 733, 746-47 (1962) (a public interest attaches to people who by their
5 accomplishments, mode of living, professional standing or calling, create a legitimate and
6 widespread attention to their activities). The court also finds that the broadcasting of
7 Cuban's statements contributed to the public discussion of the topic by eliciting Cuban's
8 view of the dispute during the midst of the controversy.

9 To the extent that Nelson argues that the contract dispute was a private dispute, and
10 therefore not converted into a matter of public interest, the court disagrees. As
11 acknowledged by Nelson, "he is well-known as a head coach and general manager of
12 professional basketball teams," and his contract dispute with defendants "received great
13 national and worldwide attention and publicity." As such, Nelson's contract dispute with
14 defendants was not a private matter; rather, it was a topic of widespread concern to a
15 substantial number of people, and therefore it was a matter of public interest. Indeed, the
16 challenged statements made by Cuban were prompted by the public's interest in the
17 dispute.

18 In sum, defendants have sustained their burden of making an initial prima facie
19 showing that Nelson's suit arises from an act in furtherance of Cuban's right of free speech.
20 That is, defendants have made a prima facie showing that the challenged speech was
21 made in connection with an issue of public interest within the meaning of section 425.16(e).

22 2. Probability of Prevailing on the Merits

23 Because defendants have made a prima facie showing that Nelson's defamation
24 claim arose from acts in furtherance of Cuban's right of free speech in connection with an
25 issue of public interest, the burden shifts to Nelson to demonstrate a probability that he will
26 prevail on his claim in order to defeat defendants' special motion to strike. Hall, 153
27 Cal.App.4th at 1345; Vess, 317 F.3d at 1110. As noted above, Nelson's burden is to make
28

1 a prima facie showing of facts that would, if proved at trial, support a judgment in his favor.
 2 Metabolife Intern., 264 F.3d at 840; Wilson, 28 Cal.4th at 821.

3 Nelson maintains that Cuban's statements were materially false and defamed him in
 4 his trade, business and profession. Specifically, Nelson contends that Cuban made the
 5 following provably false factual assertions: (1) Nelson attempted to defraud defendants; (2)
 6 Nelson initiated discussions with Cuban to amend his contract; (3) Nelson offered to accept
 7 a lump sum payment equal to half of his five-year contractual consultant's fee, but would
 8 remain a consultant to the Mavericks for the full five years and would not accept
 9 employment with another basketball franchise; and (4) Nelson made this offer with the
 10 intent to induce defendants to pay him the money and with the intention of accepting a
 11 head coaching position with the Warriors.

12 Defendants, for their part, argue that there is no reasonable probability Nelson can
 13 prevail on his defamation claim. They argue that the challenged statements do not amount
 14 to actionable defamation for two reasons. First, defendants argue that the statements were
 15 either true or mere opinion, non-actionable rhetoric, or hyperbole. Second, defendants
 16 argue that Nelson, as a public figure, cannot prove that the statements were published with
 17 actual malice by clear and convincing evidence.

18 a. Elements of a Defamation Claim

19 "Defamation is an invasion of the interest in reputation. The tort involves the
 20 intentional publication of a statement of fact that is false, unprivileged, and has a natural
 21 tendency to injure or which causes special damage." Smith v. Maldonado, 72 Cal.App.4th
 22 637, 645 (1999). Defamation in written form is called libel, which is defined as "a false and
 23 unprivileged publication by writing, printing, picture, effigy, or other fixed representation to
 24 the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which
 25 causes him to be shunned or avoided, or which has a tendency to injure him in his
 26 occupation." Cal. Civ.Code, § 45. Defamation in its oral form is called slander, which is
 27 defined as a "false and unprivileged publication, orally uttered, and also communications by
 28 radio" which, *inter alia*: "[t]ends directly to injure [a person] in respect to his office,

1 profession, trade or business, either by imputing to him general disqualification in those
 2 respects which the office or other occupation peculiarly requires, or by imputing something
 3 with reference to his office, trade, profession, or business that has a natural tendency to
 4 lessen its profits[.]” Cal. Civ.Code § 46(3).

5 i. Proof of Falsity Required

6 There can be no recovery for defamation without a falsehood. Baker v. Los Angeles
 7 Herald Examiner, 42 Cal.3d 254, 259 (1986); see also Nygard, 159 Cal.App.4th at 1048
 8 (The *sine qua non* of recovery for defamation is the existence of a falsehood.). Thus, to
 9 state a defamation claim that survives a First Amendment challenge, plaintiff must present
 10 evidence of a statement of fact that is provably false. Milkovich v. Lorain Journal Co., 497
 11 U.S. 1, 20 (1990); Nygard, 159 Cal.App.4th at 1048. Statements of opinion are not
 12 actionable. McGarry v. University of San Diego, 154 Cal.App.4th 97, 112 (2007); see also
 13 Campanelli v. Regents of University of California, 44 Cal.App.4th 572, 578 (statements of
 14 opinion rather than fact are not actionable “[e]ven if they are objectively unjustified or made
 15 in bad faith.”); Ferlauto v. Hamsher, 74 Cal.App.4th 1394, 1401 (1999) (rhetorical
 16 hyperbole, vigorous epithets, lusty and imaginative expressions of contempt, and language
 17 used in a loose, figurative sense are not actionable because they cannot reasonably be
 18 interpreted as stating actual facts about an individual); Information Control Corp. v. Genesis
 19 One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980) (apparent statements of fact may
 20 be deemed opinions “when made in public debate, heated labor dispute, or other
 21 circumstances in which an ‘audience may anticipate efforts by the parties to persuade
 22 others to their positions by use of epithets, fiery rhetoric or hyperbole . . .’ ”). This rule
 23 “provides assurance that public debate will not suffer for lack of imaginative expression or
 24 the rhetorical hyperbole which has traditionally added much to the discourse of our Nation.”
 25 Nygard, 159 Cal.App.4th at 1049 (quotation marks omitted).

26 However, a statement that implies a false assertion of fact, even if couched as an
 27 opinion, can be actionable. Milkovich, 497 U.S. at 18-19. Expressions of opinion thus do
 28 not “enjoy blanket constitutional protection.” Franklin v. Dynamic Details, Inc., 116

1 Cal.App.4th 375, 384 (2004). “If a statement of opinion implies a knowledge of facts which
2 may lead to a defamatory conclusion, the implied facts must themselves be true.” Ringler
3 Associates Inc. v. Maryland Casualty Co., 80 Cal.App.4th 1165, 1181 (2000). An opinion
4 loses its constitutional protection and becomes actionable when it is “based on implied,
5 undisclosed facts” and “the speaker has no factual basis for the opinion.” Ruiz v. Harbor
6 View Community Association, 134 Cal.App.4th 1456, 1471 (2005). Ultimately, “the
7 dispositive question is whether a reasonable fact finder could conclude the published
8 statement declares or implies a provably false assertion of fact.” Franklin, 116 Cal.App.4th
9 at 385; Rosenaur v. Scherer, 88 Cal.App.4th 260, 280 (2001). In making this
10 determination, courts must be cautious not to inhibit vigorous public debate about public
11 issues, and should err on the side of allowing free-flowing discussion of current events.
12 Rosenaur, 88 Cal.App.4th at 280.

13 California courts use a totality of the circumstances test to determination whether a
14 statement is fact or opinion. Campanelli, 44 Cal.App.4th at 578. In reviewing the
15 questioned statements, the court must assume the role of the average reader and decide
16 the natural and probable effect on the reader of the statement. Id. The words themselves
17 must be examined to see if they have a defamatory meaning, or if the sense and meaning
18 fairly presumed to have been conveyed to those who read it have a defamatory meaning.
19 Id. Statements cautiously phrased in terms of apparency are more likely to be opinions.
20 Id.; see also Information Control, 611 F.2d at 784 (“Where the language of the statement is
21 ‘cautiously phrased in terms of apparency’ or is of a kind typically generated in a spirited
22 legal dispute in which the judgment, loyalties and subjective motives of the parties are
23 reciprocally attacked and defended in the media and other public forums, the statement is
24 less likely to be understood as a statement of fact rather than as a statement of opinion.”).

25 In addition to the language, the context of a statement must be examined.
26 Campanelli, 44 Cal.App.4th at 578. The court must look at the nature and full content of
27 the communication and to the knowledge and understanding of the audience to whom the
28 publication was directed. Id. When the statements are made in the arena of a public

1 debate or controversy, the court must examine the whole record. Id. The issue of whether
2 a communication was a statement of fact or opinion “is a question of law to be decided by
3 the court.” Baker, 42 Cal.3d 254, 260.

4 In sum, the test to be applied in determining whether an allegedly defamatory
5 statement constitutes an actionable statement of fact requires that the court: (1) examine
6 the statement in its totality in the context in which it was uttered or published; (2) consider
7 all the words used, not merely a particular phrase or sentence; (3) give weight to cautionary
8 terms used by the person publishing the statement; and (4) consider all of the
9 circumstances surrounding the statement, including the medium by which the statement is
10 disseminated and the audience to which it is published. Information Control, 611 F.2d at
11 784.

12 Applying this test, the court concludes that the challenged statements may not serve
13 as the predicate for a defamation claim under California law. Having reviewed the content
14 of the allegedly defamatory statements from the standpoint of the average listener,
15 including the manner in which the statements were phrased, the context in which the
16 statements arose, the medium by which the statements were disseminated and the
17 knowledge and understanding of the audience to whom the publication was directed, the
18 court finds that the statements are non-actionable statements of opinion, rather than
19 verifiable statements of fact.

20 Cuban’s characterization of the contract dispute can only be regarded as statements
21 of opinion. The allegedly defamatory statements made by Cuban were phrased in terms of
22 how he “felt” and what he “thought.” The statements thus expressed Cuban’s belief, not a
23 general truth. For example, Cuban’s affirmative response to the question “Like you feel like
24 you were being deceived?” and his statement “I thought [Nelson] tried to rip me off” are
25 significant qualifiers because they gave the audience a reason to construe Cuban’s
26 statements as opinion rather than fact. Cuban’s acknowledgment that he “felt” deceived by
27 Nelson and that he “thought” he was being ripped off by Nelson connote subjective
28 judgments, and therefore constitute mere opinion, not factual assertions.

1 In addition, the challenged statements were made during the midst of a contentious
2 debate concerning a bitter legal dispute following Nelson's resignation as head coach of the
3 Mavericks, and his decision to accept the head coaching position with the Warriors, a
4 competitor of the Mavericks, in lieu of providing consulting services for the Mavericks. The
5 statements were made on a sports talk show to an audience that would be expected to be
6 familiar with Nelson, Cuban and the ongoing contract dispute, as well as generally
7 sympathetic to Nelson's position given that the radio program is broadcast throughout the
8 San Francisco Bay Area – home of the Warriors. In this context, the audience was likely to
9 understand that the statements made by Cuban were made for the purpose of persuading
10 others to his position by the use of rhetorical hyperbole, especially, where, as here, the
11 radio hosts prefaced their comments about the topic by stating that: "We love [Nelson],
12 everybody loves [Nelson] here. You hate [Nelson]"; and concluded by stating: "Listen, we
13 are all on Nelson's side always, but nice to get [Cuban's] side of the story." A reasonable
14 audience presented with one side of a story, in the context of a heated contract dispute,
15 would be inclined to conclude that the story being told represented the subjective view of
16 the particular speaker, not objective fact. See Gardner v. Martino, 563 F.3d 981 (9th Cir.
17 2009) (a radio talk show program that contains elements of drama, hyperbolic language,
18 opinionated and arrogant host, and heated controversy reduce the audience's expectation
19 of learning an objective fact).

20 In sum, the court concludes that, under the totality of the circumstances, the average
21 listener would naturally and probably view Cuban's statements as a hyperbolic
22 characterization that expressed his opinion of the contract dispute, not assertions of
23 objective fact. Accordingly, the court finds that Cuban's statements were not defamatory
24 and Nelson is therefore unlikely to prevail on the merits.

25 ii. Public Figure

26 Even assuming Cuban's statements are actionable falsehoods, not opinion, Nelson
27 has another sizable hurdle to clear. Since public figures must prove by clear and
28 convincing evidence that an allegedly defamatory statement was made with knowledge of

falsity or reckless disregard for truth, a threshold determination in a defamation action is whether the plaintiff is a public figure. Ampex Corp. v. Cargle, 128 Cal.App.4th 1569, 1577 (2005) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964)); see also McGarry, 154 Cal.App.4th at 113-14. There are two classes of public figures: (1) the “all purpose” public figure who has achieved such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts; and (2) the “limited purpose” public figure, an individual who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. Ampex, 128 Cal.App.4th at 1577; McGarry, 154 Cal.App.4th at 113. The rationale for treating public figures differently from private citizens is that: (1) “ ‘public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy’ ”; and (2) “public figures have invited the attention and comment they receive and must accept certain necessary consequences of their choice, including the risk false and injurious statements will be made about them.” Gallagher v. Connell, 123 Cal.App.4th 1260, 1272 (2004); see also Khawar v. Globe Intern., Inc., 19 Cal.4th 254, 263 (1998) (The Supreme Court “imposed the actual malice requirement on defamation actions by public figures and public officials for two reasons: They have media access enabling them to effectively defend their reputations in the public arena; and, by injecting themselves into public controversies, they may fairly be said to have voluntarily invited comment and criticism.”).

The elements that must be present in order to characterize a plaintiff as a limited purpose public figure are: (1) there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for non-participants; (2) the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue; and (3) the alleged defamation must be germane to the plaintiff’s participation in the controversy. Gilbert v. Sykes, 147 Cal.App.4th 13, 24 (2007). Unlike the all purpose public figure, the limited purpose public figure loses certain protection for his or her reputation only to the extent that the allegedly

1 defamatory communication relates to his role in a public controversy. McGarry, 154
2 Cal.App.4th at 113.

3 While Nelson acknowledges that he is a well-known head coach and general
4 manager for several NBA franchises, he nonetheless maintains that he is not a public
5 figure. The court disagrees. Because Nelson voluntarily entered the public arena as a
6 basketball coach and/or general manager for several NBA franchises, and because the
7 challenged statements arose out of the performance of the public role he voluntarily
8 undertook, the court concludes that Nelson is a limited public figure for purposes of the
9 statements made by Cuban on the Murph & Mac show. McGarry, 154 Cal.App.4th at 115
10 (concluding that college football coach was a limited public figure for purposes of allegedly
11 defamatory statements that dealt exclusively with his performance of the public role he
12 voluntarily undertook); Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967) (noting that one
13 of the plaintiffs, a well-known football coach and athletic director, was a limited public figure
14 by "position alone").² As noted above, the record indicates that the contract dispute was
15 highly publicized, garnering national attention, and that both Nelson and Cuban made
16 statements to the media regarding the controversy, including the challenged statements at
17 issue in this action. Thus, the court finds it proper to impose the actual malice requirement
18 on Nelson. As a head coach and/or general manager for several NBA franchises, Nelson
19 invited the attention and comment he received and enjoys significantly greater access to
20 the channels of effective communication, and hence has a more realistic opportunity to
21 effectively defend his reputation in the public arena than other individuals normally enjoy.

22 Accordingly, because the court concludes that Nelson is a limited purpose public
23 figure, he bears the burden of establishing a probability that he can produce clear and
24 convincing evidence that the allegedly defamatory statements were made with actual

25
26 ² The court notes that while defendants argue that Nelson is a general purpose public
27 figure, the court is not convinced, based on the evidence in the record, that Nelson is a general
28 purpose public figure "for all purposes and in all contexts." Gertz v. Robert Welch, Inc., 418
U.S. 323, 352 (1974) ("[A]bsent clear evidence of general fame or notoriety in the community,
and pervasive involvement in the affairs of society, an individual should not be deemed a
public personality for all aspects of his life.").

malice, i.e., with knowledge of their falsity or with reckless disregard of their truth or falsity. Ampex, 128 Cal.App.4th at 1578.

iii. Actual Malice

Where the plaintiff in a defamation action is a public figure, he or she must plead and prove actual malice. Vogel v. Felice, 127 Cal.App.4th 1006, 1017 (2005). In the context of a special motion to strike pursuant to the anti-SLAPP statute, a limited purpose public figure such as Nelson must establish a probability that he can produce clear and convincing evidence that the allegedly defamatory statements were made with knowledge of their falsity or with reckless disregard of their truth or falsity. Ampex, 128 Cal.App.4th at 1578.

“The reckless disregard test requires a high degree of awareness of the probable falsity of the defendant’s statement. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” Ampex, 128 Cal.App.4th at 1579 (quotation marks omitted). This is a subjective test that focuses on the “defendant’s attitude toward the veracity of the published material, as opposed to his or her attitude toward the plaintiff.” Id.

“To meet the clear and convincing standard, the evidence must be such as to command the unhesitating assent of every reasonable mind.” Ampex, 128 Cal.App.4th at 1579 (quotation marks omitted); McGarry, 154 Cal.App.4th at 114. “This heightened standard of proof must be taken into account in deciding a defendant’s motion to strike a claim for defamation under section 425.16.” Walker v. Kioussis, 93 Cal.App.4th 1432, 1446 (2001).

Having reviewed the evidence submitted by the parties, the court concludes that Nelson has not carried his burden on the question of actual malice. Nelson has neither pleaded actual malice nor produced sufficient evidence of actual malice to withstand defendants’ special motion to strike, i.e., established a probability that he can produce clear and convincing evidence that the allegedly defamatory statements were made with actual malice. First, as to pleading, the court finds that the FAC is legally insufficient on its face because it fails to plead that Cuban made the allegedly defamatory statements with actual

1 malice as that term is defined in the context of defamation claims asserted by limited
2 purpose public figures. The FAC does not plead a knowing and reckless falsehood. It
3 alleges only that Cuban's statements about Nelson were "materially false," that "Cuban
4 described the details of the dispute falsely," and that "the entirety of the statement by
5 Cuban, taken as a whole, was false and defamatory." In fact, the FAC only contains the
6 conclusory boilerplate allegation that Cuban and the Mavericks acted "falsely, maliciously,
7 fraudulently and oppressively." Such allegations are insufficient to state a cause of action
8 in a case where actual malice is required. See Vogel, 127 Cal.App.4th at 1017-18.

9 Second, as to evidence, the court finds that Nelson did not sustain his burden to
10 establish a probability that he can produce clear and convincing evidence that the allegedly
11 defamatory statements were based on facts he either knew were false or believed were
12 likely to be false. Nelson did not produce sufficient direct evidence, such as a declaration
13 from Nelson or deposition testimony indicating that Cuban actually believed his statements
14 to be false or that he had a high degree of awareness of the probable falsity of his
15 statements. In fact, the deposition testimony produced by Nelson indicates that Cuban's
16 statements reflected his general understanding of the contract dispute, not that his
17 statements were based on facts he either knew were false or believed were likely to be
18 false. O'Connor Supp. Decl., Exhs. 104-105. Nor are the e-mails produced by Nelson,
19 O'Connor Supp. Decl., Exhs. 101-103, sent from Cuban to the press in July 2007, sufficient
20 to show that Cuban made the challenged statements based on facts he either knew were
21 false or believed were likely to be false. Rather, the e-mails show that Cuban made similar
22 statements about the contract dispute prior to his appearance on the Murph & Mac show.

23 In addition, Nelson did not produce sufficient circumstantial evidence from which to
24 infer actual malice. To the extent that Nelson argues that actual malice can be inferred
25 from Cuban's ill-will and hostility towards him, as evidenced by the e-mails sent from Cuban
26 to the press in July 2007 wherein Cuban questions Nelson's ethics, refers to him as a
27 "mother fucker," and describes him as being "sleazy," about "cash and nothing else," and
28 as having no "scruples," O'Connor Supp. Decl., Exhs. 102-103, the court disagrees. Even

1 assuming that these statements raise an inference of ill-will, personal spite or bad motive,
2 they are insufficient to demonstrate the requisite malice required to withstand defendants'
3 special motion to strike. These remarks do not permit the conclusion that Cuban
4 entertained serious doubts about the veracity of his statements or that he lacked
5 reasonable grounds to believe the statements were true. Instead, they simply reflect
6 Cuban's attitude toward Nelson regarding the contract dispute. See Ampex, 128
7 Cal.App.4th at 1579 (actual malice will not be inferred solely based on evidence of ill-will,
8 personal spite or bad motive); Harte-Hanks Communications, Inc. v. Connaughton, 491
9 U.S. 657, 685-86 (1989) ("the actual malice standard is not satisfied merely through a
10 showing of ill will or malice in the ordinary sense of the term").

11 In short, even construing the evidence in the light most favorable to Nelson, the
12 court concludes that the evidence, at most, tends to suggest that Cuban's statements were
13 an inaccurate characterization of the contract dispute, which is insufficient to demonstrate
14 actual malice. See Kashian v. Harriman, 98 Cal.App.4th 892, 931 (2002) (To show malice
15 it is not sufficient to show that the objectionable statements were inaccurate, or even
16 unreasonable; rather, a plaintiff must show willful falsity or recklessness.). As such, Nelson
17 failed to establish a probability that he can produce clear and convincing evidence that the
18 allegedly defamatory statements were made with knowledge of their falsity or with reckless
19 disregard of their truth or falsity such as to command the unhesitating assent of every
20 reasonable mind.

21 Accordingly, because Nelson failed to sustain his burden to demonstrate a
22 probability of prevailing on the merits, defendants' special motion to strike is GRANTED.³

23
24 ³ Finally, to the extent that the FAC makes a vague reference to other allegedly
25 defamatory statements that defendants caused to be published on or around July 31, 2008,
26 the court finds that Nelson has failed to sufficiently allege actual malice or produce any
27 evidence on this issue to withstand defendants' special motion to strike. The FAC neither
28 specifically identifies the allegedly defamatory statements made by defendants nor alleges that
such statements were made with actual malice. See Vogel, 127 Cal.App.4th at 1017-18, n.
3 (defamation must be pleaded with particularity; each allegedly defamatory statement must
be specifically identified if not set forth verbatim in the complaint). Nor did Nelson produce any
evidence in support of these alleged defamatory statements in response to defendants' special
motion to strike.

CONCLUSION

For the reasons stated above, defendants' special motion to strike is GRANTED, and Nelson's motion to strike is GRANTED. Because § 425.16 makes no provision for amending the complaint once the court grants a special motion to strike, the FAC is STRICKEN with prejudice. See Simmons v. Allstate Ins. Co., 92 Cal.App.4th 1068, 1073-74 (2001) (explaining that permitting leave to amend after a special motion to strike is granted would "frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits"). The case management conference scheduled for July 2, 2009 is VACATED. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: June 30, 2009



PHYLLIS J. HAMILTON
United States District Judge